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Supreme Court, U.S.
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No. 04-1306

In the Supreme Court of the United States

ELIZABETH MOLLINGER-WILSON AND
LT. COLONEL ROBERT E. WILSON, USMC-RET.,
Petitioners,

v.

THE QUIZNO'S FRANCHISE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR REHEARING

ELIZABETH MOLLINGER-WILSON
ROBERT E. WILSON
12017 VIVACITE DRIVE
ST. LOUIS, MO 63146
(314) 983-0290

Petitioners pro se

Becker Gallagher Legal Publishing, Inc. 800.890.5001

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INTRODUCTION

Grounds for this Petition For Rehearing are as follows: *First*, it is proper that the record be completed as there is a post-judgment order from the U.S. District Court for the District of Colorado, issued after petitioners filed their Petition For Writ Of Certiorari, that substantially favors the question presented by petitioners. *Second,* to raise substantial issues not previously presented regarding Federal Rule 56 and the practices of the Tenth Circuit as related to this, and other, pro se appeals. Respondent did not respond to the Petition For Writ of Certiorari. This petition is timely filed under Rule 44(2) of the Rules of the Supreme Court.

REASONS FOR REHEARING

I. THE U.S. DISTRICT COURT'S POST-JUDGMENT ORDER FAVORS THE QUESTION PRESENTED BY PETITIONERS.

As background, petitioners note that:

In March 2004, the U.S. District Court for the District of Colorado granted petitioners' motion for summary judgment ruling that respondent *"materially breached"* a contract that was executed in front of the same federal court. Although finding merit to petitioners' claim and although petitioners asked for a trial on damages, the District Court granted respondent's cross-summary judgment motion, awarding petitioners nominal damages.

Petitioners raised the question to this Supreme Court if the respondent, in their cross-motion, violated petitioners' Fourth Amendment Constitutional right to privacy to be secure in their personal papers. The added implication is that such a

violation allows the courts to issue an order to compel production of personal papers for one specific reason, then later "move the line" and allow those same papers to be used in another manner – impacting the aggrieved party's procedural due process right to appeal the court's initial order.

At issue is the manner in which respondent used copies of petitioners' income tax returns. Petitioners pointed to the record on appeal that is ***undisputedly*** clear that the U.S. Magistrate Judge compelled petitioners to produce copies of their income tax returns, reasoning that respondent was "*entitled to have your income tax returns so that they can effectively cross-examine you at the time of trial.*" R. Vol. VI, Transcript, filed 2/13/03 at page 18 in the record on appeal in the Tenth Circuit, filed May 24, 2004.

Petitioners argued that it was improper to grant respondent's cross-motion since respondent used petitioners' personal papers not "at the time of trial" and as respondent attached those personal papers as exhibits to open pleadings, without protecting petitioners' financial identifying numbers. The outcome, besides a misuse of the Magistrate's order, was that petitioners' papers were made vulnerable to identity theft – thereby violating petitioners' right to privacy. Petitioners were, concurrently, denied their right to appeal the Magistrate's order, under Fed. R. Civ. P. 72, as petitioners produced their personal papers, in good faith *consistent with* the Magistrate's order that those documents be used at trial. The District Court or the Tenth Circuit never addressed petitioners' objections.

In seeking rehearing, petitioners note that:

Upon the Tenth Circuit's remand of this case back to the jurisdiction of the District Court, petitioners filed a Post-Judgment Motion to Seal those documents reiterating both of the arguments petitioners make above, attaching a copy of the related transcript in which the Magistrate ordered petitioners' taxes to be produced for trial. Petitioners relied on the District of Colorado's local rule 7.2 that requires a showing of "*compelling reason*" in which to seal papers and documents filed in a case.

On March 30, 2005, the U.S. Magistrate Judge issued his Order to seal the exhibits to both Quizno's Reply in Support of Motion for Summary Judgment as Docket #116 and Quizno's Response to Plaintiffs' Objections to Magistrate's Recommendation as Docket #122.[1] The Magistrate ruled that:

> "[t]he court finds that the plaintiffs have made a showing of compelling reasons for the sealing of their financial documents, to include tax returns, which are attached as exhibits to Dockets #116 and #122." App. A. at 2b.

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[1] Petitioners have filed an objection (in part) to the Magistrate's order that leaves open respondent's pleadings. Petitioners note that respondent's pleadings also refer to line item numbers and financial data from petitioners' income taxes and to seal just the exhibits, without also sealing the offending pleadings, does not fully accomplish the goal of protecting petitioners' privacy. Petitioners also note that consistent with local rule 7.2, ample time has expired and no public interest has objected to the pleadings being sealed and respondent did not respond to petitioners' motion to seal. As of the date of this Petition For Rehearing, the District Court has not issued its final order.

Petitioners sincerely do not wish to stretch the impact of this recent order. However, the Magistrate's order, essentially, favors the question presented by petitioners ... if there is "*compelling reason*" based on petitioners' identical arguments to seal the exhibits to both respondent's pleadings ... then it logically follows that there is "*compelling reason*" to conclude that those papers, as exhibits, should not have been used in an unprotected dispositive cross-motion, but rather, for the time of trial.

Consequently, the Tenth Circuit should not have affirmed the grant of respondent's cross-motion on damages, but rather, remand the case for a trial on damages, where petitioners can use their right to a secured and even-playing field with equalities not available in problematic written pleadings.

In rehearing, this Court is encouraged to be piloted by the enduring strength and vision of the American Constitution, written in a time when its architects could not image today's advanced technology that widens the door to both information exchange, but sorrowfully allows for information and identity abuse. Very simply, having produced personal papers in good faith, petitioners, and any American citizen engaged in civil proceedings, have the fundamental right to some assurance that their papers be secured and used – for the purpose in which those documents were compelled to be produced.

II. THIS SUPREME COURT IS ENCOURAGED TO REVIEW FEDERAL RULE 56(d) AND THE PRACTICES OF THE TENTH CIRCUIT AS RELATED TO PRO SE APPEALS.

On April 12, 2005, after petitioners filed their Petition for Writ of Certiorari, Justices Kennedy and Thomas sat before Congress to address budget matters of this Supreme Court. While the hearing concerned mostly matters of the budget relating to the security of the Court, Justice Kennedy, in responding to a question, artfully noted that:

> "[t]he Constitution was not made for a bunch of lawyers or judges," but for the American people - and the people must see a link to the Constitution in its own time.

With respect to lawyers, Justice Kennedy's words ring true in this case, brought not by a "bunch of lawyers," but by pro se litigants dealing with everyday rule of law, Federal Rule 56, perhaps not as glamorous as the issues that make their way to this Supreme Court, but law when the standard is deviated from, can deny a citizen the simplest of Constitutional rights - that to be heard in trial.

While it is an honor to come to a court pro se, that right should not also carry with it an extra burden.[2] Petitioners would be remiss not to seek rehearing on that substantial ground (whether a party raises the issue at the outset of a case or before this Court is of no consequence). *United States v.*

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[2] In this case, petitioners come with costs paid, but, wish to note that it should matter not whether a pro se civil litigant come with costs or not.

Corrick, 298 U.S. 435, 440 (1936). Ideally, this Court is encouraged to review and amend the language of Fed. R. Civ. P. 56(d) that assumingly fails to recognize that a pro se litigant may be party to a cross-motion for summary judgment. Specifically, the language of Rule 56(d) states that:

> "[t]he court at the ***hearing of the motion***, by examining the pleadings and the evidence before it and *by interrogating counsel*, shall if practicable ascertain what material facts are actually in good faith controverted." Emphasis added.

The failure of the language of Rule 56 (d) to include an unrepresented party, in sync with other federal rules, subsequently, allows a Magistrate or District Judge, nationwide, to "literally" read Rule 56, automatically excluding a pro se litigant from the possibility or benefit of a *hearing*. While petitioners realize that a hearing comes with standards, the option for one must be non-discriminately inclusive in federal rules. Otherwise, such is both arbitrary and prejudicial to any and every American citizen, who may potentially find themselves, as petitioners did, coming to the courts pro se, by circumstances created by the respondent.

Accordingly, had a "hearing on the motion," in accordance with the standard of Fed. R. Civ. P. 56(d) been held by the Magistrate or District Court, this case may not have even found its cobbled-way to the Tenth Circuit and this Supreme Court.

This Court is also encouraged to review the practices of the Tenth Circuit as related to pro se appeals.[3] While petitioners properly requested oral argument in this case, the Tenth Circuit concluded that oral argument would not materially assist the determination of the appeal, citing Fed. R. App. P. 34(2) and 10th Circuit Rule 34.1(G). Federal Rule 34 is clear that oral argument ***must be allowed in every case*** and sets a standard for when oral argument is excluded.

However, the complete language of Tenth Circuit Rule 34.1 only recognizes the *"presence of counsel"* in oral arguments and appears to automatically exclude oral argument in all pro se appeals as the following language from the cited Tenth Circuit Rule 34.1(G), confusingly, implies:

> "[E]xcept in pro se appeals or when both parties have waived oral argument, the court will notify the parties when a panel decides that oral argument is not necessary."

Certainly, if afforded the benefit of a hearing, many of the erroneous findings of facts or the misapplication of law found in the Tenth Circuit's opinion may have been eliminated,

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[3] It should be noted that in addition to an inconsistency in 10th Circuit Rule 34 with Fed. R. App. P. 34, that the practice of 10th Circuit Rule is also inconsistent with Fed. R. App. P. 31 that requires an appellant's Opening Brief to be filed within 40 days after the record on appeal is sent to the Appellate Court. The 10th Circuit practice, as in this case, requires that an appellant's Opening Brief be filed within 40 days after the first notice of the appeal is sent to the Appellate Court. Consequently, pro se petitioners, do not have the advantage of the final record to prepare their Opening Brief or the equal time given to represented parties to formulate theories and authorities.

allowing petitioners their right to a trial on damages. Specifically, the Tenth Circuit wrongly concluded that the material breach was somehow cured – halting damages – although respondent acknowledged the possibility of lost profits in their stipulated to Pre-trial Order and refuses to examine the substantial equity of the franchise agreement, but then affirms the finding of the Magistrate that the franchise agreement was substantially equal.

The Tenth Circuit concludes, wrongly, that petitioners represented respondent in the Rocky Mountains, applying just Colorado law, although petitioners' area was Northeast Wisconsin and concludes that petitioners' Declaration (that shows a significant economic loss of income and expenses) somehow fall short, although fails to say exactly how. Ultimately, the Tenth Circuit fails to ascertain the undisputed material fact (that goes to the issue of the material breach being cured) that, as of this day, petitioners have no "valid" franchise agreement as the contractual language promises – or that petitioners had no obligation to accept the spoiled fruit of their contract that sat on the dock before delivery over eleven months late. In the end, respondent broke their promise executed in front of a federal court and left the injured party with $1.00.

In rehearing, petitioners encourage this Court to make a statement that the *same and equal benefit* for a "hearing on the motion," provided for in the language of Rule 56 (d), also, be extended to an unrepresented party.

CONCLUSION

Petitioners, with respect, petition for rehearing to review and address the grounds now presented, to grant the Petition

For Writ of Certiorari on its merits and remand this case back to the Tenth Circuit, as appropriate.

Dated: June 8, 2005

Elizabeth Mollinger-Wilson
Lt. Colonel Robert Wilson, USMC-Ret.

Petitioners Pro Se
12017 Vivacite Drive
St. Louis, MO 63146
(314) 983-0290

CERTIFICATE

We, Elizabeth Mollinger-Wilson and Robert Wilson, do hereby certify that this Petition For Rehearing is presented in good faith and not for delay. The petition is restricted to the grounds specified in Rule 44 (2) of the Rules of the Supreme Court.

Respectfully Submitted:

Elizabeth Mollinger-Wilson

Elizabeth Mollinger-Wilson

Robert E. Wilson

Robert E. Wilson

Dated: June 8, 2005

12017 Vivacite Drive
St. Louis, MO 63146
(314) 983-0290

Petitioners pro se

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

No. 02-N-0436 (OES)

[Filed March 30, 2005]

Elizabeth Mollinger-Wilson and	)
Lt. Colonel Robert E. Wilson, USMC-Ret.	)
Plaintiffs,	)
	)
v.	)
	)
The Quizno's Franchise Company,	)
Defendant.	)
	)

ORDER

Entered by O. Edward Schlatter, United States Magistrate Judge

Plaintiffs have filed a (Post-Judgment) Motion To Seal Documents, requesting that the two documents filed by the defendant during the course of this litigation be sealed because financial documentation disclosed by the plaintiffs in the course of discovery in this matter was attached by the defendant as exhibits to the documents. On March 23, 2005, the motion was referred to me for resolution. Pursuant to

D.C.Colo.LCivR 7.1A, the plaintiffs indicate that they have conferred with counsel for the defendant in this regard, and that counsel indicates that the defendant opposes the motion. However, the Certificate of Service attached to the plaintiffs' motion indicates that defendant was served, by mail, with this motion on February 24, 2005. To date, no objection or resistance to the motion has been filed by the defendant.

In their motion, plaintiffs request the sealing of Quizno's Reply in Support of Motion for Summary Judgment, filed on May 6, 2003, as Docket #116, and Quizno's Response to Plaintiffs' Objections to Magistrate's Recommendation, filed on November 3, 2003, as Docket #122. When a party requests a seal order, a court must carefully balance the competing interests that are at stake in the particular case. *See Nixon v. Warner Communications*, 435 U.S. 589, 599 (1978). The ultimate decision to issue a seal order lies in the trial court's sound discretion. *Id.*

In balancing the respective interests of the parties and the public, the court finds that the plaintiffs have made a showing of compelling reasons for the sealing of their financial documents, to include tax returns, which are attached as exhibits to Dockets #116 and #122. However, it is not necessary to completely seal Dockets #116 and #122. Based on the information contained in their motion, plaintiffs' interests will be sufficiently protected by sealing only the exhibits attached to the defendant's filings. Additionally, by only sealing the exhibits, the public's interest in access to the filings of the defendant will not be unduly infringed.

Accordingly, it is hereby ORDERED that Plaintiffs' (Post-Judgment) Motion To Seal Documents (Filed February 24, 2005; Docket #1501) is GRANTED in part and DENIED in

part. The Office of the Clerk is directed to place under seal only the exhibits attached to each of Dockets #116 and #122.

BY THE COURT:
/s/

O. Edward Schlatter
United States Magistrate Judge